SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~883~~ 53

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 133, UAW, AFL-CIO, PETITIONER,

vs.

THE FAFNIR BEARING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case No. 1-CA-4077

146 NLRB No. 179

October 6, 1964

THE FAFNIR BEARING COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD—
Filed October 9, 1964

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

The Fafnir Bearing Company (the Company) files this petition pursuant to the provisions of Section 10(f) of the National Labor Relations Act, 29 U.S.C. Section 160(f), for a review of the decision and order of the National Labor Relations Board (the Board) entered at Washington, D. C. on May 13, 1964 finding that the Company had violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act (the Act) by refusing to permit an industrial engineer employed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 133, UAW, AFL-CIO (the Union) to perform independent time studies, in production areas of the Company's plant, during working hours, on jobs involved in certain piece-work price grievances arising under the parties' collective bargaining agreement.

In support of this petition, the Company respectfully represents as follows:

I.

Jurisdiction

The Company is a corporation organized and existing under the laws of the State of Connecticut and having its principal office and place of business in the Town of New Britain, County of Hartford, in said State, where it is engaged in the business of the manufacture, sale and distribu-[fol. 2] tion of ball bearings and related products. Further, the alleged unfair labor practices were alleged to have been committed or engaged in within the Second Circuit and thus within the jurisdiction of this Court. This Court therefore has jurisdiction of this petition by virtue of said Section 10(f) of the Act.

II.

Statement of the Proceeding

This is a proceeding on a complaint issued by the General Counsel of the Board, dated May 7, 1963, alleging a violation by the Company of Sections 8(a)(5) and 8(a)(1) of the Act. The basic substance of the allegations of the complaint are contained in paragraphs 10, 11 and 12 thereof wherein General Counsel alleges that since on or about February 7, 1963, the Company has refused the Union's request for permission to conduct its own time studies relative to certain piece-work prices that are the subject of certain grievances being processed by the Union, that said time studies "are relevant to the Union's evaluation of the merits of said grievances and would assist it in intelligently determining whether arbitration was advisable", and that such action on the part of the Company constitutes a refusal to bargain in good faith and hence is a violation of said Sections of the Act. Hearing on said complaint was had before Trial Examiner James V. Constantine who, on September 26, 1963, issued his Decision, as of record will appear, finding that the Company had not refused to bargain in good faith by denying access to production areas of the Company's plant during working hours to a Union indus-

trial engineer for the purpose of making independent time studies of the disputed operations, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel of the Board and the Union filed exceptions to the Trial Examiner's Decision and briefs in support thereof, and the Company filed a brief in support of the Trial Examiner's Decision and cross-exceptions and a brief [fol. 3] in support of such cross-exceptions. The Board issued its Decision and Order as aforesaid overruling the decision of the Trial Examiner, as will appear of record. Thereafter, on June 10, 1964, the Company filed a motion for reconsideration and a motion to reopen the record with the Board. General Counsel of the Board and the Union filed objections to the granting of such motions and, on August 20, 1964, both of said motions were denied by the Board.

III.

Assignments of Error

The Company, as a basis for review, makes the following assignments of error:

1. The Board's holding that the Union has an absolute, statutory right of access to the production areas of the Company's plant during working hours, for the purpose of making independent time studies of disputed operations by its own expert to investigate and verify time study data already furnished to the Union by the Company, is contrary to law.

2. The Board's holding that the Company refused to bargain in good faith by denying access to production areas of the Company's plant during working hours to a Union industrial engineer, for the purpose of making independent time studies of disputed operations to investigate and verify time study data already furnished to the Union by the Company, is contrary to law in view of the history of the bargaining relationship between the parties, the availability to the Union of the Company time study data, the stand-

ard set forth in the parties' collective bargaining agreement for testing a piece-work price, the parties' contractual grievance procedure, the failure on the part of the Union to exhaust those procedures and the agreed-upon right of access of an arbitrator to ultimately resolve the disputes.

3. The Board erred in holding that the Trial Examiner committed no prejudicial error in overruling the Company's motion to dismiss the complaint, dated August 13, 1963, [fol. 4] thus failing to impose upon General Counsel the burden of proving that denial of plant access during working hours to a Union expert for independent time studies of disputed operations constituted an unreasonable impediment upon the Union's exercise of its statutory rights as the employees' bargaining representative.

4. In holding that the Trial Examiner committed no prejudicial error in overruling the Company's motion to dismiss the complaint, dated August 13, 1963, the Board, contrary to law, shifted to Respondent the burden of proving that denial of plant access during working hours to a Union expert for independent time studies of disputed operations did not constitute an unreasonable impediment upon the Union's exercise of its statutory rights as bargaining representative.

5. The Board's finding that the Company time study data furnished to the Union and the means afforded by the parties' contractual grievance procedures were insufficient to enable the Union to make a decision as to whether to take the four grievances in issue to arbitration and thus properly to perform its function as the employees' bargaining representative, and that access by a Union industrial engineer to production areas of the Company's plant during working hours was necessary for such purpose, is not supported by substantial evidence on the record considered as a whole.

6. The Board's finding that the Company failed to prove that access to the production areas of the Company's plant would be disruptive of production and discipline is not sup-

ported by substantial evidence on the record considered as a whole.

7. The Board erred in failing to grant the Company's motion to reopen the record to introduce expert testimony from a qualified industrial engineer to the effect that (i) without plant access and independent time studies by a Union expert, alternative sources of information were sufficient to enable the Union to make an intelligent decision as to whether the four grievances should have been taken to [fol. 5] arbitration, and (ii) plant access by a Union industrial engineer would unduly interfere with production operations and discipline, because the complaint and proceedings had thereon until the commencement of the hearing on August 13, 1963 only gave the Company notice that it was the claim of General Counsel that such independent time studies "are relevant to the Union's evaluation of the merits of said grievances and would assist it in intelligently determining whether arbitration was advisable", not that independent time studies were necessary to enable the Union properly to perform its duty as bargaining representative.

8. The Board erred with respect to the breadth and scope of paragraph 1(a) of its Order which requires the Company to cease and desist from refusing to permit the Union to perform independent time studies, through its own experts, on jobs involved in grievances arising under the parties' collective bargaining agreement in that such order should clearly be limited to the jobs involved in the four piecework price grievances in issue, and unless access for such purpose is otherwise contrary to law, to jobs involved in identical or substantially similar grievances where such independent time study for the purpose of a Union decision as to whether a grievance should be arbitrated is demonstrably necessary because all alternative sources of information available to the Union have been exhausted and are insufficient.

IV.

Prayer for Relief

Wherefore Petitioner prays for a review of the Findings, Decision and Order of the National Labor Relations Board and that:

1. A copy of this petition be served upon the Board;

2. Said Findings, Decision and Order of the Board be in all respects set aside, and the complaint against the Company dismissed;

[fol. 6] 3. The Board be ordered to reopen the record for the purposes specified in paragraph III, 7 above;

4. The Company shall have such other and further relief as may be just and proper in the circumstances and which may to equity appertain.

Robinson, Robinson & Cole, By Lucian E. Baldwin, Attorney for Petitioner, 750 Main Street, Hartford, Connecticut.

[fol. 7] [File endorsement omitted]

[fol. 8]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29243

THE FAFNIR BEARING COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION FOR REVIEW, AND CROSS-PETITION FOR ENFORCEMENT OF, AN ORDER OF THE BOARD—Filed October 27, 1964

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

The National Labor Relations Board, by its Assistant General Counsel, pursuant to the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), files this answer to the petition for review of its order issued on May 13, 1964.

1. The Board admits the jurisdiction of this Court.

2. With respect to the statements contained in paragraph II of the petition for review, the Board prays reference to the certified record, which will be filed, for a full and accurate recital of the facts and procedure in this case.

3. The Board denies each and every assignment of error contained in paragraph numbered III, and subparagraphs thereunder, of the Petition.

4. Further answering said petition the Board says that the proceedings had before it, the findings of fact, conclusions of law and order of the Board were and are in all respects valid and proper under the National Labor Rela-

tions Act and, pursuant to Section 10(e) of the Act, the Board respectfully requests this Court to enforce the order of the Board issued against the petitioner on May 13, 1964, in Case No. 1-CA-4077.

5. Pursuant to Rule 13(g) of this Court, the Board will certify and file with this Court a certified list of all the materials containing the record in the proceeding before it in Case No. 1-CA-4077.

[fol. 9] Wherefore, the Board prays that this Court cause notice of the filing of this Answer and Cross-Petition for Enforcement to be served upon petitioner and that this Court enter a decree denying the petition for review and enforcing the Board's order in full.

Marcel Mallet-Prevost, Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., Oct. 26, 1964.

[fol. 10] [File endorsement omitted]

[fol. 11] NOTICE OF MOTION (omitted in printing).

[fol. 13]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case No. 29243

THE FAFNIR BEARING COMPANY, Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR LEAVE TO INTERVENE—
Dated November 17, 1964

To The Honorable Judges of the United States Court of Appeals for the Second Circuit:

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133, UAW, AFL-CIO (referred to as the Union), moves for leave to intervene as a party in the present proceedings. In support thereof, the Union shows that:

1. The Union filed unfair labor practice charges alleging violations of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U. S. C. §158(1) and (5), upon which the National Labor Relations Board issued an unfair labor practice complaint against petitioner. Throughout the proceedings before the National Labor Relations Board (hereinafter referred to as the Board), the Union fully participated and actively supported the charges it had filed. On September 26, 1963, the Trial Examiner issued his findings and decision recommending that the complaint [fol. 14] be dismissed. The Union filed exceptions to the Trial Examiner's findings and filed a brief supporting its exceptions. On May 13, 1964, the Board issued an order adjudging petitioner guilty of unfair

labor practices as defined in Sections 8(a)(1) and (5) of the Act, *The Fafnir Bearing Company*, 146 N.L.R.B. 179. The Board's order requires the Company to cease and desist from: "Refusing to bargain collectively with [the Union], by refusing to permit the Union to perform independent time studies, through its own experts, on jobs involved in grievances arising under the parties' collective bargaining agreement," and affirmatively orders the petitioner "upon request, permit the Union to perform its own time studies on the jobs involved." Petitioner seeks to have this order reviewed and set aside by this Court.

2. The Board's order thus is the culmination on the administrative level of a proceeding initiated and pressed to a successful resolution by the Union. The Union continues to represent the employees at the petitioner's plant and states the following grounds which require intervention:

The Union is bound in fact by the result here.

(a) The Union is bound by the decision of this Court. A judgment invalidating the Board's order, from which the Union derives substantial benefit, would be final and conclusive and the Union would have no way to redress the injury it suffered because of the judgment rendered in its absence.

[fol. 15] *The Union's interest can be represented adequately only by the Union.*

(b) The labor relations agreement between the Employer and the Union provides for time study of certain jobs. During the years of continued relations between the parties, the Union on numerous occasions requested time study data and the right to have the jobs studied by their own experts. This right was and is needed for the proper administration of the contract. Without such right, the

Union is unable to properly represent its membership or administer the contract. Accordingly, although the Union has the greatest respect for the National Labor Relations Board, it is the *Union's* contract, the *Union's* bargaining status, and the *Union's* members that are jeopardized by the employer's refusal to bargain in good faith. Clearly the contentions of the Union should be advanced in its own behalf.

A compelling reason for the granting of intervention here is that the Board, for a variety of reasons, frequently declines to seek *certiorari* review of adverse Courts of Appeals decisions. In the event of such an adverse decision here, the Union would be denied further review unless it had standing as a party. Similarly, if the Board were to prevail here, it might not oppose petitioner's request for Supreme Court review. If the Union is permitted intervention, however, it would have standing to petition for or to oppose certiorari. [fol. 16] Moreover, there is always the possibility of a doctrinal shift within the Board or the possibility that the Board may see fit to settle or compromise the case.

The case is of national significance.

(c) The matter in issue is of tremendous importance to the Union involved in this proceeding before this Court, as well as to thousands of other unions in the United States having labor relations agreements and facing the problem of time studies of jobs in connection with their administration of labor relations agreements. The ultimate decision in this case might well affect millions of workers and the Union should be permitted to fully participate in the litigation of this matter to its ultimate conclusion.

Intervention might avoid subsequent litigation.

(d) In the event of an adverse ruling and remand to the Board by this Court, the Union, most probably, would be "aggrieved" by the Board's decision upon such remand within the meaning of Section 10(f) of the Act, 29 U.S.C. §160(f). As a consequence the Union would have standing then to seek review *de novo*. Similarly, if petitioner and the Board attempted to settle without the Union having been heard on that issue, or without the Union's consent, an action would lie. In the interest of avoiding a multiplicity of proceedings, the Union should be permitted to intervene at this time.

[fol. 17] *The motion should be granted because there is no prejudice.*

(e) Intervention should be granted because there is a common question of law and fact and there is no probability of delay or prejudice to the parties as a result of the Union's intervention. Intervention, thus, will not delay adjudication or complicate the proceedings.

3. The Union will, if intervention is permitted, support the Board's decision and its petition for enforcement.

Wherefore, the Union respectfully prays that the motion to intervene be granted.

Respectfully submitted,

Joseph L. Rauh, Jr., General Counsel, International Union, UAW, 1625 K St., N.W., Washington 6, D. C.

Stephen I. Schlossberg, Associate General Counsel, International Union, UAW, 8000 E. Jefferson Ave., Detroit 14, Michigan.

John Silard, 1625 K St., N.W., Washington 6, D. C.

William S. Zeman, One Grand St., Hartford 6, Conn.

Benjamin Rubenstein, 393 Seventh Avenue, New York 1, N. Y.

Attorneys for Union.

[fol. 18] Dated: November 17, 1964

To:

Robinson, Robinson & Cole, 750 Main Street, Hartford, Connecticut, Att: Lucian E. Baldwin, Esq., Attorney for Petitioner.

Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington 25, D. C.

[fol. 20]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29,243

THE FAFNIR BEARING COMPANY, Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO MOTION FOR LEAVE TO INTERVENE—November 20, 1964

The National Labor Relations Board opposes the Motion to Intervene filed on November 17, 1964, in the above-entitled proceeding by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 133, UAW, AFL-CIO. In support of its opposition, the Board shows as follows:

1. The movant filed with the Board the unfair labor practice charges upon which the complaint against peti-

tioner issued in the instant case. The movant's "interest" in the enforcement of the Board's order, within the meaning of Rule 13(f) of the rules of this Court, is that it will benefit by enforcement of the Board's order against petitioner.

2. As a matter of policy, the Board has consistently opposed intervention by charging parties in support of Board orders because enforcement proceedings are public proceedings for the vindication of public rights. The Board has filed a cross-petition for enforcement of its unfair labor practice order; the petition will be prosecuted diligently, and in a manner that will best serve the public interest. Under the circumstances, no purpose will be served by permitting movant, a private party, to intervene in this litigation, for in this type of proceeding "private parties have no rightful place except as the Court may decide to avail itself of helpful suggestions."

[fol. 21] *Aluminum Ore Co.* v. *N.L.R.B.*, 131 F. 2d 485, 488 (C. A. 7). Accord: *Amalgamated Meat Cutters* v. *N.L.R.B.*, 267 F. 2d 169, 170 (C. A. 1), certiorari denied, 361 U.S. 863; *Semi Steel Casting Co.* v. *N.L.R.B.*, 160 F. 2d 388, 393 (C. A. 8); *Haleston Drug Stores, Inc.* v. *N.L.R.B.*, 190 F. 2d 1022 (C. A. 9); *Henry I. Siegel, Inc.* v. *N.L.R.B.*, No. 29058 (C. A. 2) (unreported).

3. Since movant does not claim to be aggrieved by the Board's order, but seeks only to represent its interest in procuring affirmance by this Court of the order of the Board, it is plain that this interest of movant and the broader interest of the Court may best be served by permitting movant to file a brief *amicus curiae.*

Wherefore, the Board requests that the Court deny the Motion to Intervene, with leave to movant to file a brief as *amicus curiae.*

Marcel Mallet-Prevost, Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., this 20th day of November, 1964.

[fol. 22] Certificate of Service (omitted in printing).

[fol. 24]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29,243

THE FAFNIR BEARING COMPANY, Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

OPPOSITION OF THE FAFNIR BEARING COMPANY TO PETITION FOR LEAVE TO INTERVENE—November 24, 1964

The Fafnir Bearing Company opposes the Petition for Leave to Intervene filed on November 17, 1964 by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133 UAW, AFL-CIO on the ground that the Union has no standing as a party to this review proceeding in that it is not a "person aggrieved" under Section 10(f) of the National Labor Relations Act, 61 Stat. 148 (1947) 29 U.S.C.A. Section 160(f). *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO* v. *National Labor Relations Board,* 267 Fed. 2d 169, 170 (CA 1).

Wherefore, the Company requests that the Court deny the Petition for Leave to Intervene.

Robinson, Robinson & Cole, By Lucian E. Baldwin,
Counsel to The Fafnir Bearing Company.

Dated at Hartford, Connecticut this 24th day of November, 1964.

[fol. 25] Certificate of Service (omitted in printing).

[fol. 27]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term, 1964.

Motion Argued November 30, 1964

Docket No. 29243

THE FAFNIR BEARING COMPANY, Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

Before: Friendly and Smith, Circuit Judges, and Blumenfeld, District Judge.*

Motion by union, which had filed charge leading to a determination of unfair labor practices on the part of an employer, for leave to intervene in employer's proceeding for review of the Board's order, in which the Board cross-petitioned for enforcement. Motion denied, with leave to file brief as *amicus curiae*.

OPINION—Decided December 24, 1964

FRIENDLY, *Circuit Judge*:

This is a proceeding by The Fafnir Bearing Company to review an order of the National Labor Relations Board, [fol. 28] 146 N. L. R. B. No. 179 (1964), finding that Fafnir had violated §§8(a)(1) and (5) of the National Labor Relations Act by refusing to permit the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133, to perform independent time studies on jobs involved in grievances under the parties' collective bargaining agreement; the Board has cross-petitioned for enforcement. The union, which had filed the

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* Sitting by designation.

pertinent charge, seeks leave to intervene. The company and the Board oppose it, the Board suggesting that we grant the union leave to file a brief as *amicus curiae*. We deny the motion and grant such leave.

Although courts of appeals have permitted a charging person to intervene in a proceeding brought by the Labor Board for enforcement of an order stemming from the charge or a proceeding brought by the condemned party to review such an order, §§10(e) and (f), see, e.g., *West Texas Utils. Co.* v. *NLRB*, 184 F. 2d 233 (D. C. Cir. 1950), *cert. denied*, 341 U. S. 939 (1951); *Kearney & Trecker Corp.* v. *NLRB*, 210 F. 2d 852 (7 Cir. 1954), *cert. denied*, 348 U. S. 824 (1954), all opinions of such courts discussing the issue that have been cited to us have ruled against intervention. See *Aluminum Ore Co.* v. *NLRB*, 131 F. 2d 485, 488 (7 Cir. 1942); *Stewart Die Casting Corp.* v. *NLRB*, 132 F. 2d 801 (7 Cir. 1942); *Haleston Drug Stores, Inc.* v. *NLRB*, 190 F. 2d 1022 (9 Cir. 1950), *cert. denied*, 342 U. S. 815 (1951); *NLRB* v. *Retail Clerks Int'l Ass'n*, 243 F. 2d 777, 783 (9 Cir. 1956); *Amalgamated Meat Cutters* v. *NLRB*, 267 F. 2d 169 (1 Cir.), *cert. denied sub nom. Geilich Tanning Co.* v. *Amalgamated Meat Cutters*, 361 U. S. 863 (1959). Since the issue has not been decided in this circuit, and the union contends that the decisions elsewhere contravene Supreme Court authority, we have thought it desirable to make an independent appraisal. After doing so, we join with other cir-
[fol. 29] cuits in denying intervention, although the issue seems more debatable to us than it did to them.

Section 10(b) of the National Labor Relations Act defines the procedure for an unfair labor practice case. There must first be a charge of an unfair labor practice committed within the preceding six months; the Board or its agent may, but is not required to, issue a complaint. Only the person complained of is expressly given the right to a hearing. But "in the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony." As we read the Board's Rules and

Regulations, §102.8, 29 C. F. R. §102.8 (1964), the charging person is recognized as a party to the administrative proceeding without the need for seeking intervention.

On the other hand the Act makes no provision as to intervention in proceedings for review or enforcement of Board orders—a silence which contrasts with the provisions as to intervention included in the statutes relating to judicial review of orders of the Interstate Commerce Commission, 28 U. S. C. §2323, and in the Hobbs Act, 5 U. S. C. §1038, but which is paralleled by a similar silence as to the review of orders of other administrative agencies, see, e.g., 15 U. S. C. §717r (Natural Gas Act), 16 U. S. C. §8251 (Federal Power Act), 49 U. S. C. §1486 (Federal Aviation Act), compare 49 U. S. C. §1489. Rule 13 of this Court, our version of the uniform rule as to practice and procedure on review of agency action promulgated by the Judicial Conference as directed in the Hobbs Act, 5 U. S. C. §1041, provides in paragraph (f) for a motion by "A person desiring to intervene in a case where the applicable statute does not provide for intervention" without saying what the standards governing intervention are. The fact that the union was accorded the status of an intervener before the Board does not automatically entitle it to the same role in a pro-[fol. 30] ceeding for judicial review. *Amalgamated Meat Cutters* v. *NLRB, supra,* 267 F. 2d at 170.

If we look to F. R. Civ. P. 24 by way of analogy, we ought consider subdivision (a)(2) granting intervention as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action," and subdivision (b)(2) for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Although on a superficial view both provisions might seem applicable, analysis shows neither to be. Normally a charging person has no "claim" of any sort apart from that which the Board elects to bring on his behalf; certainly that is true of the union

here.[1] However deeply he may be concerned with the outcome of the Board's proceeding, *Amalgamated Util. Workers* v. *Consolidated Edison Co.*, 309 U. S. 261 (1940), holds that he does not have any legal "interest" since the purpose of the Labor Act is simply to enforce public rights—the Court analogizing the Act to the Federal Trade Commission Act and the rule of a charging party under the former to that of an informant under the latter.

The union's first counter to this—that if the Board had rejected the complaint in whole or even in part, the union could have petitioned for review under §10(f) as "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," *American* [fol. 31] *Newspaper Publishers Ass'n* v. *NLRB*, 345 U. S. 100 (1953), is unpersuasive. As we have just pointed out in *Local 282, Int'l Bhd. of Teamsters* v. *NLRB*, —— F. 2d —— (2 Cir. 1964), the charging person is given standing to do this *ex necessitate* to prevent this portion of the statute from being rendered nugatory, and he is vindicating not a private but the public right. But the union then brings before us the ruling in *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335, 338-39 (1945), that unions, permitted to intervene in the court of appeals to support a petition by the Board to vacate a decree for back-pay so as to substitute another method, had standing to seek Supreme Court review of an order denying the Board's petition from which the Board had not sought certiorari. See also *Donnelly Garment Co.* v. *NLRB*, 330 U. S. 219 (1947). The Court supported its somewhat cryptic

[1] A different case might—or might not—be presented when the charging person has a contractual claim which he submits initially to the Board because it may also involve an unfair labor practice. Cf. *Smith* v. *Evening News Ass'n*, 371 U. S. 195, 197-98 (1962). Our opinion is not addressed to such a case. And the right of a respondent who has been wholly or partially successful before the Board, to intervene on a petition by the charging party to reverse or modify the Board's order, presents a problem wholly different from that here considered. Such intervention seems to have been regularly allowed, and there would appear to be no doubt as to its propriety.

statement that "in the circumstances disclosed, the petitioners, though they could not have instituted enforcement proceedings, had standing to seek review of the order denying the Board's petition," with two citations. One, *Williams* v. *Morgan*, 111 U. S. 684 (1884), held that bondholders and a committee representing purchasers at a foreclosure sale had standing to seek review of an order as to a mortgage trustee's compensation. The other was the first round of *Amalgamated Util. Workers, supra, Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 218 (1938), which recited the intervention of the alleged company unions as parties aggrieved by the order and of the charging union, seeking to organize the workers, in support of the order, without indicating whether these applications had been opposed.[2]

[fol. 32] The Ninth Circuit, dealing with a problem somewhat different from that here presented, distinguished *Eagle-Picher* on the basis that the union there held to have standing to seek certiorari had already been allowed to intervene in the court of appeals. See *NLRB* v. *Retail Clerks Int'l Ass'n, supra*, 243 F. 2d at 783. It can be argued to the contrary that the Supreme Court would hardly have considered itself bound by an erroneous grant of intervention by a court of appeals. However, nothing indicates that anyone had resisted intervention in the court of appeals, in *Eagle-Picher Mining & Smelting Co.* v. *NLRB*, 141 F. 2d 843 (8 Cir. 1944), and the propriety of such intervention was not even considered in the briefs submitted to the Supreme Court, where the NLRB argued the merits precisely as if it had taken the appeal itself. In this context, we cannot regard the Supreme Court's comment as resolving by implication the problem of contested intervention by a charging party in the courts of appeals.

The union suggests that intervention should be allowed in order to permit it to seek Supreme Court review of an

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[2] Examination of the records indicates that the company union had petitioned for review and that its petition was consolidated with the company's; and that the motion of the charging union to intervene was unopposed and was granted by a single judge.

adverse decision against the Board's opposition or to block a settlement to which the Board and the respondent might agree. If in fact intervention would permit this—a point which we do not decide—these considerations would weigh against the grant rather than for it. We have just held in *Local 282* that the Board may settle over the wishes of the charging party prior to a hearing; no reason appears why the General Counsel could not abandon a case altogether at that stage if this seemed wise. The reasoning that sustains this power applies with almost the same force to the Board after it has passed on the merits of a complaint. While the energy already spent and the disharmony promoted are beyond recall, the public interest as viewed by the Board may yet dictate that the conflict proceed no further; and [fol. 33] *Amalgamated Util. Workers,* which was itself concerned with post-decision rights of the charging party, makes the public interest controlling.

It is true that settlement or abandonment after a Board decision on the merits may leave a precedent on the books which is insulated from review. But the holding is discounted for that very reason, and the problem will likely arise again in some other case where a different balance of factors does not suggest compromise. There is no real analogy with the charging party's conceded right of review after an unfavorable Board decision, where, for example, an erroneous belief of lack of power by the Board might otherwise be perpetuated in case after case. The union also notes that, absent intervention, a charging party's ability to compel an application for certiorari from an adverse decision by us may turn on whether the Board's original decision upheld the party respondent or the charging party. We fear that such minor anomalies cannot be wholly ironed out of the legislative scheme,[3] and we here face no extraor-

[3] Asymmetry would also result if we allowed intervention to facilitate a charging party's applying for certiorari; any advantage would then turn on whether review or enforcement proceedings happened to be initiated, creating the opportunity to intervene, before the Board called a halt.

dinary abuse of administrative discretion testing the limits of judicial power to respond. Cf. *Hourihan* v. *NLRB*, 201 F. 2d 187, 188 & n.4 (D. C. Cir. 1952), *cert. denied*, 345 U. S. 930 (1953). The controlling principle must be that the Board's exclusive powers, granted by Congress in the public interest and more than once recognized by the Supreme Court, should not be impaired by a general practice of granting intervention to charging parties in the courts of appeals.

Motion to intervene denied, with leave to file brief as *amicus curiae*.

[fol. 34]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges, Hon. M. Joseph Blumenfeld, District Judge.

THE FAFNIR BEARING COMPANY, Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

ORDER DENYING MOTION FOR LEAVE TO INTERVENE—
December 24, 1964

A motion having been made herein by counsel for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133, for leave to intervene,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied with leave to the union to file a brief amicus curiae.

A. Daniel Fusaro, Clerk.

[fol. 35] [File endorsement omitted]

[fol. 36] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 37]

SUPREME COURT OF THE UNITED STATES

No. 883—October Term, 1964

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 133, UAW, AFL-CIO, Petitioner,

v.

THE FAFNIR BEARING COMPANY, et al.

ORDER ALLOWING CERTIORARI—March 29, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar. The case is set for oral argument immediately following No. 650.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.